

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RICKY NOLAN,

Plaintiff,

V.

CADE HERRING, *et al.*

Defendants.

3:14-cv-00445-MMD-VPC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary judgment (ECF No. 84, 85), plaintiff's opposition (ECF Nos. 103, 105)¹, and defendants' reply (ECF Nos. 99, 106). Having thoroughly reviewed the record and papers, the court hereby recommends that the defendants' motion for summary judgment be denied.

I. PROCEDURAL HISTORY

18 Ricky Nolan (“plaintiff”) is an inmate in the custody of the Nevada Department of
19 Corrections (“NDOC”). Presently, plaintiff is incarcerated at Ely State Prison (“ESP”) in Ely,
20 Nevada. Pursuant to 42 U.S.C. § 1983 and proceeding *pro se*, plaintiff brings a civil rights action
21 for violations of his constitutional rights.

According to the complaint, the events giving rise to plaintiff's claims are as follows. On June 27, 2013, defendants used excessive force on plaintiff while he was awaiting transport to another facility. (ECF No. 1-1.) Defendants repeatedly hit and kicked plaintiff in the head and body. (*Id.* at 7.) Plaintiff was also choked and had his head slammed into the wall and ground.

¹ Plaintiff also filed a cross-motion for summary judgment (ECF No. 98), which was stricken from the record because it was untimely filed and longer than thirty pages. (See ECF No. 101.)

(*Id.*) On August 27, 2013, while plaintiff was lying in his bunk, one of the defendants threatened plaintiff with physical harm if he filed one more grievance about the beating. (*Id.* at 11.)

On December 12, 2014, the District Court screened the complaint (ECF No. 14). The Court permitted two claims to proceed: (1) an Eighth Amendment claim for excessive use of force against defendants Correctional Officer Cade Herring (“Herring”), Correctional Officer Hal Hollingsworth (“Hollingsworth”), Correctional Officer Nathan Mingo (“Mingo”),² Correctional Officer Dan Clark (“Clark”), Correctional Officer Glenn Dolezal (“Dolezal”), and Sergeant Paul Hunt (“Hunt”), (*Id.* at 4-5); and (2) a First Amendment claim for retaliation against Herring. (*Id.* at 6-7.)

On May 26, 2015, the parties participated in a mediation session as part of the District of Nevada's early inmate mediation program, but did not settle. On May 17, 2016, defendants moved for summary judgment (ECF No. 84). This recommended disposition follows.

II. LEGAL STANDARD

Summary judgment allows the court to avoid unnecessary trials. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The court properly grants summary judgment when the record demonstrates that “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). “[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A dispute is “genuine” only where a reasonable jury could find for the nonmoving party. *Id.* Conclusory statements, speculative opinions, pleading allegations, or other assertions uncorroborated by facts are insufficient to establish a genuine dispute. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *Nelson v. Pima Cnty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996). At this stage, the court’s role is to verify that reasonable minds could differ when interpreting the

² Mingo was dismissed from this action pursuant to Fed. R. Civ. P. 4(m). (See ECF No. 69.)

1 record; the court does not weigh the evidence or determine its truth. *Schmidt v. Contra Costa*
 2 *Cnty.*, 693 F.3d 1122, 1132 (9th Cir. 2012); *Nw. Motorcycle Ass'n*, 18 F.3d at 1472.

3 Summary judgment proceeds in burden-shifting steps. A moving party who does not
 4 bear the burden of proof at trial “must either produce evidence negating an essential element of
 5 the nonmoving party’s claim or defense or show that the nonmoving party does not have enough
 6 evidence of an essential element” to support its case. *Nissan Fire & Marine Ins. Co. v. Fritz*
 7 *Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Ultimately, the moving party must demonstrate, on
 8 the basis of authenticated evidence, that the record forecloses the possibility of a reasonable jury
 9 finding in favor of the nonmoving party as to disputed material facts. *Celotex*, 477 U.S. at 323;
 10 *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). The court views all evidence
 11 and any inferences arising therefrom in the light most favorable to the nonmoving party.
 12 *Colwell v. Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014).

13 Where the moving party meets its burden, the burden shifts to the nonmoving party to
 14 “designate specific facts demonstrating the existence of genuine issues for trial.” *In re Oracle*
 15 *Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted). “This burden is not a
 16 light one,” and requires the nonmoving party to “show more than the mere existence of a
 17 scintilla of evidence. . . . In fact, the non-moving party must come forth with evidence from
 18 which a jury could reasonably render a verdict in the non-moving party’s favor.” *Id.* (citations
 19 omitted). The nonmoving party may defeat the summary judgment motion only by setting forth
 20 specific facts that illustrate a genuine dispute requiring a factfinder’s resolution. *Liberty Lobby*,
 21 477 U.S. at 248; *Celotex*, 477 U.S. at 324. Although the nonmoving party need not produce
 22 authenticated evidence, Fed. R. Civ. P. 56(c), mere assertions, pleading allegations, and
 23 “metaphysical doubt as to the material facts” will not defeat a properly-supported and
 24 meritorious summary judgment motion, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
 25 U.S. 574, 586–87 (1986).

26 For purposes of opposing summary judgment, the contentions offered by a *pro se* litigant
 27 in motions and pleadings are admissible to the extent that the contents are based on personal
 28 knowledge and set forth facts that would be admissible into evidence and the litigant attested

1 under penalty of perjury that they were true and correct. *Jones v. Blanas*, 393 F.3d 918, 923 (9th
 2 Cir. 2004).

3 III. DISCUSSION

4 A. Civil Rights Claims Under § 1983

5 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority to
 6 deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d 1063,
 7 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)). The
 8 statute “provides a federal cause of action against any person who, acting under color of state
 9 law, deprives another of his federal rights[,]” *Conn v. Gabbert*, 526 U.S. 286, 290 (1999), and
 10 therefore “serves as the procedural device for enforcing substantive provisions of the
 11 Constitution and federal statutes,” *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).
 12 Claims under § 1983 require a plaintiff to allege (1) the violation of a federally-protected right
 13 by (2) a person or official acting under the color of state law. *Warner*, 451 F.3d at 1067.
 14 Further, to prevail on a § 1983 claim, the plaintiff must establish each of the elements required to
 15 prove an infringement of the underlying constitutional or statutory right.

16 B. Eighth Amendment Excessive Use of Force Claim

17 Defendants argue that plaintiff’s excessive force claim is without merit and that the
 18 minimal amount of force used on plaintiff “was done to maintain the internal security of the
 19 institution.” (ECF No. 84 at 15, 19.) Additionally, defendants argue that summary judgment
 20 should be granted as to defendant Dolezal, as he was not present during any part of the incident.
 21 (*Id.* at 19.)

22 The Eighth Amendment’s proscription on cruel and unusual punishment forbids prison
 23 officials from inflicting “the unnecessary and wanton infliction of pain . . .” *Whitley v. Albers*,
 24 475 U.S. 312, 319 (1986). Encompassed within the Eighth Amendment is a bar on the use of
 25 excessive force against prisoners. *See Hudson v. McMillian*, 503 U.S. 1, 7-10 (1992). Courts in
 26 the Ninth Circuit apply a five-part balancing test to excessive force claims: (1) the extent of the
 27 inmate’s injuries; (2) the need for application of force; (3) the relationship between the need and
 28 amount of force; (4) the threat reasonably perceived by prison officials; and (5) any efforts that

1 officials utilized to “temper the severity of a forceful response.”” *Id.* at 7 (quoting *Whitley*, 475
 2 U.S. at 321); *see also Wilkins v. Gaddy*, 559 U.S. 34, 36-38 (2010); *Martinez v. Stanford*, 323
 3 F.3d 1178, 1184 (9th Cir. 2003).

4 The inmate must demonstrate that officials acted maliciously and sadistically to prevail.
 5 “[W]henever prison officials stand accused of using excessive physical force in violation of the
 6 [Eighth Amendment], the core judicial inquiry is . . . whether force was applied in a good-faith
 7 effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson*,
 8 503 U.S. at 6-7. As the Ninth Circuit has explained,

9 [t]he “malicious and sadistic” standard arose out of “the need to maintain or
 10 restore discipline” inside the prison. When a prison disturbance occurs, prison
 11 officials must make “decisions ‘in haste, under pressure, and frequently without
 12 the luxury of a second chance.’” In these situations, prison officials are “accorded
 13 wide-ranging deference” and therefore, prisoners alleging excessive force must
 14 show that the force was applied “maliciously and sadistically to cause harm.”

15 *Wood v. Beauclair*, 692 F.3d 1041, 1049-50 (9th Cir. 2012) (quoting *Hudson*, 503 U.S. at 6 and
 16 *Whitley*, 475 U.S. at 320). Thus, the court must be careful when reviewing the factors to verify
 17 indicia of “such wantonness with respect to the unjustified infliction of harm as [is] tantamount to
 18 a knowing willingness that it occur.” *Hudson*, 503 U.S. at 9. Moreover, there is no need for a
 19 showing of serious injury as a result of the force, but the lack of such injury is relevant to the
 20 inquiry. *See id.* at 7-9; *Martinez*, 323 F.3d at 1184; *Schwenk v. Hartford*, 204 F.3d 1187, 1196
 21 (9th Cir. 2000).

22 Excessive force cases “nearly always requires a jury to sift through disputed factual
 23 contentions, and to draw inferences therefrom,” and for this reason, the Ninth Circuit has “held on
 24 many occasions that summary judgment or judgment as a matter of law in excessive force cases
 25 should be granted sparingly.” *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002); *see also Lolli*
v. Cnty. of Orange, 351 F.3d 410, 415–16 (9th Cir. 2003); *Liston v. Cnty. of Riverside*, 120 F.3d
 26 965, 976 n. 10 (9th Cir. 1997) (citing cases).

27 Defendants argue that excessive force was not used against plaintiff. (ECF No. 84.)
 28 Defendants claim that while plaintiff was waiting to be transported to another institution, he had
 his hands in his pockets and was not facing the south wall as he was ordered to do. (*Id.* at 17.)

1 Because plaintiff refused commands to face the south wall, defendants Hollingsworth and Herring
 2 moved him to the north wall to deescalate the situation. (*Id.*) At that point, plaintiff “broke away
 3 from the hands-on escort in an aggressive manner.” (*Id.*) Hollingsworth and Herring brought
 4 plaintiff to the ground to prevent him “from potentially attacking correctional officers, inciting a
 5 riot in the nearby transfer inmates, or otherwise harming himself.” (*Id.*) Hollingsworth and
 6 Herring brought plaintiff to the ground “by placing their hands on [his] shoulders, pushing
 7 downwards so that [he] would crumple onto his knees, and thereafter pushing [him] down onto
 8 his belly to lie prostrate on the ground.” (*Id.*) Two others, Mingo and former Correctional
 9 Officer Paul Malay (“Malay”), assisted Hollingsworth and Herring once plaintiff was on the
 10 ground, also using “minimal force to maintain[] control over [p]laintiff’s prostrate quadrants.”
 11 (*Id.*) Almost immediately after being brought down, plaintiff was cooperative and the force did
 12 not escalate. (*Id.*) Hunt called for a video-recorder (Clark) and a medical response team to
 13 respond to the scene. (*Id.*) Upon examination by ESP medical staff, no obvious injuries were
 14 noted. (*Id.; see also* ECF Nos. 84-1, 85-1, 85-2, 85-3.)

15 Defendants contend that minimal force was required when plaintiff was uncooperative and
 16 that defendants used an appropriate amount of force to place plaintiff on the ground in order to
 17 maintain the internal security of the institution. (ECF No. 84.) Defendants provide sworn
 18 declarations of each of the officers involved in the incident. (ECF Nos. 84-5, 84-7, 84-8, 84-9,
 19 84-11.) Defendants also include the investigation detail report, the medical incident reports, and a
 20 videotape that documented the period after the incident, when plaintiff was held on the floor and
 21 examined by medical staff. (ECF Nos. 84-6, 85-1, 85-2, 85-3, 84-10.)

22 Plaintiff offers his affidavit and sworn declaration as evidence in support of his version of
 23 the events. (ECF No. 98 at 75-79, 94-97.) Plaintiff states that while waiting to be transported to
 24 another facility, defendants Herring and Hollingsworth approached him and started yelling at him
 25 for no reason. (ECF No. 1-1 at 5.) Plaintiff claims that Herring and Hollingsworth struck him
 26 repeatedly in the face, head, and body with a closed fist, choked him, bashed his head into a wall
 27 numerous times, picked him up off the ground, and slammed him down headfirst. (ECF No. 1-1
 28 at 7.) Herring sat on plaintiff’s back, attempting to break his neck. (*Id.*) Hollingsworth yelled at

1 plaintiff and kicked him in the back, neck, and face. (*Id.*) Defendant Clark kicked plaintiff in the
2 back, neck, and face. (*Id.*) Defendant Dolezal twisted plaintiff's left ankle in an attempt to break
3 it and kicked him in the back and face. (*Id.*) Defendant Hunt watched this incident from three
4 feet away as his correctional officers beat plaintiff. (*Id.*) Plaintiff was restrained when the
5 incident occurred. (*Id.* at 5.) Plaintiff asserts that though he offered no resistance, he was
6 repeatedly punched in the face, kicked, and slammed against the ground and wall. (ECF No. 1-1.)
7 Plaintiff claims that because of the alleged excessive force he suffered injuries and continues to
8 have pain in his back, neck, head, left ankle, and left shoulder and blurred vision in both eyes.
9 (ECF No. 105 at 6.) Plaintiff claims at least two other inmates witnessed the event, but because
10 he was denied inmate-to-inmate correspondence, he was unable to obtain declarations from them.
11 (ECF No. 105 at 16.)

12 Viewing the evidence in the light most favorable to plaintiff, the court cannot say as a
13 matter of law that the force used was not excessive. Plaintiff's and defendants' version of the
14 events in question clearly differ, and both sides provide evidence in the form of supporting sworn
15 declarations. Defendants characterize the force as "minimal" (ECF No. 84 at 17), while plaintiff
16 characterizes the force as "maliciously and sadistically" applied. (ECF No. 105 at 6.) Defendants
17 characterize plaintiff's injuries as *de minimis*, if not nonexistent (ECF No. 84 at 17-18), while
18 plaintiff describes numerous injuries and continued pain. (ECF No. 105 at 6.) Accordingly,
19 because a reasonable jury could conclude that defendants used an excessive amount of force,
20 defendants' motion for summary judgment as to plaintiff's excessive force claim should be
21 denied.

22 **1. Dolezal is entitled to summary judgment.**

23 Defendants Clark, Herring, Hollingsworth, and Hunt argue that defendant Dolezal was not
24 present during the incident and is, therefore, entitled to summary judgment. (ECF No. 84 at 19.)
25 "Liability under §1983 must be based on the personal involvement of the defendant." *Barren v.*
26 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Plaintiff alleges that Dolezal twisted his left
27 ankle in an attempt to break it and kicked him in the back and face. (ECF No. 1-1 at 7.)
28 However, none of the other defendants recalls Dolezal being present during the incident, and

1 Dolezal did not file an investigation detail report like all the other individuals involved. (See ECF
 2 No. 84 at 13.) Additionally, in Dolezal's sworn declaration he states he was not present during
 3 the incident. (ECF No. 84-11 at 2.)

4 As defendants' point out, it may be that plaintiff confused Dolezal with Malay, who was
 5 present for the incident and who filled out an investigation detail report stating he "grabbed
 6 inmate Nolan's feet and secured them." (ECF Nos. 84 at 18, 84-6 at 5.) Plaintiff provides no
 7 other evidence that Dolezal was present during the incident and argues only that "Dolezal had
 8 plenty of time to flee the scene." (ECF No. 103 at 5.) Because it appears that Dolezal was not
 9 personally involved in the alleged incident, he cannot be held liable. Accordingly, Dolezal should
 10 be dismissed as a defendant from this lawsuit.

11 **C. First Amendment Retaliation Claim**

12 Defendants move for summary judgment of the retaliation claim on the basis that
 13 plaintiff's claim is without merit. (ECF No. 84 at 15.) Alternatively, defendants ask for "a
 14 ruling limiting plaintiff's damages to the maximum to which he would be entitled if that claim
 15 were successful." (*Id.*)

16 It is well established in the Ninth Circuit that prisoners may seek redress for retaliatory
 17 conduct by prison officials under § 1983. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir.
 18 2004); *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). "Prisoners have a First
 19 Amendment right to file grievances against prison officials and be free from retaliation for doing
 20 so." *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012). A retaliation claim has five
 21 elements: (1) a state actor took some adverse action against the inmate (2) because of (3) the
 22 inmate's protected First Amendment conduct, and that the action (4) chilled the inmate's
 23 exercise of his First Amendment rights and (5) did not reasonably advance a legitimate
 24 correctional goal. *Rhodes*, 408 F.3d at 567–68. If the plaintiff fails to allege that the retaliation
 25 had a chilling effect, he or she may still state a claim by alleging some other harm. *Id.* at 568
 26 n.11.

27 According to plaintiff, the events giving rise to his retaliation claim are as follows. On
 28 August 27, 2013, while plaintiff was lying in his bunk, defendant Herring stood by plaintiff's

1 cell and stared at him. (ECF No. 1-1 at 11.) Herring called plaintiff a name and plaintiff
 2 answered, “what?” (*Id.*) Herring asked plaintiff, “[H]ow [did] you like that beat[ing] we put on
 3 you in June?” (*Id.*) Plaintiff asked what Herring was doing at his cell and whether Herring was
 4 going to “shake” him down. (*Id.*) Herring told him that if he filed one more grievance about the
 5 beating, the correctional officers would be back and “it [would] be worse than last time.” (*Id.*)
 6 This was the second time Herring had threatened him with physical harm after the June 27, 2013
 7 attack. (*Id.*)

8 Defendants argue only that defendant Herring never threatened plaintiff with physical
 9 violence or threatened to inhibit him from submitting grievances and that the retaliation claim
 10 should fail because there was no adverse State action. (ECF No. 84 at 21.) Instead of
 11 elaborating on this, defendants provide a detailed damages discussion, calculating the exact
 12 amount of damages (between \$2.00 and \$10.99) that plaintiff would be entitled to if he were
 13 successful on his retaliation claim. (ECF No. 84 at 21.)

14 It is improper to raise the issue of damages in a motion for summary judgment. If
 15 defendants believe plaintiff’s retaliation claim has merit, the proper course is to engage in
 16 settlement discussions with the plaintiff.

17 Defendants failed to provide competent evidence supporting their argument that no
 18 adverse State action occurred. Thus, there appears to be a genuine issue of material fact and the
 19 court recommends that defendants’ motion for summary judgment on the retaliation claim be
 20 denied.

21 IV. CONCLUSION

22 Based upon the foregoing, the court concludes that defendants have failed to demonstrate
 23 that there are no genuine issues of material fact for trial; thus, defendants’ motion for summary
 24 judgment should be denied. Additionally, plaintiff’s motion to compel is denied without
 25 prejudice. The parties are advised:

26 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
 27 Practice, the parties may file specific written objections to this Report and Recommendation
 28 within fourteen days of receipt. These objections should be entitled “Objections to Magistrate

1 Judge's Report and Recommendation" and should be accompanied by points and authorities for
2 consideration by the District Court.

3 2. This Report and Recommendation is not an appealable order and any notice of
4 appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
5 judgment.

VII. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that defendants' motion for summary judgment (ECF No. 84) be DENIED in its entirety.

9 **IT IS FURTHER RECOMMENDED** that defendant Dolezal be **DISMISSED** from
10 this action.

IT IS FURTHER RECOMMENDED that a settlement conference be set in this case.

12 | DATED: September 19, 2016.

that a settlement conference be set in this case.


UNITED STATES MAGISTRATE JUDGE